

JUL 24 2017

CLERK US DISTRICT COURT  
DISTRICT OF NEVADA

BY: \_\_\_\_\_ DEPUTY

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ANDRE SMITH-LOVEJOY,

3:17-cv-00272-MMD-VPC

Plaintiff,

v.

**REPORT AND RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

STATE OF NEVADA,

Defendant.

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is Andre Smith-Lovejoy's ("plaintiff") application to proceed *in forma pauperis* (ECF No. 1) and *pro se* complaint (ECF No. 1-1). Having reviewed the record, the court recommends that plaintiff's application to proceed *in forma pauperis* be granted, and that the complaint be dismissed with prejudice.

**I. IN FORMA PAUPERIS APPLICATION**

As set forth in 28 U.S.C. § 1915(a), the court may authorize a plaintiff to proceed *in forma pauperis* if he or she is unable to pay the prescribed court fees. Based on the financial information in the record, the court finds that plaintiff is unable to pay the filing fee in this matter. Accordingly, the court recommends that plaintiff's application to proceed *in forma pauperis* be granted.

**II. LEGAL STANDARD**

Applications to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915. Section 1915 provides, in relevant part, that "the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure

1 12(b)(6), and the court applies the same standard under section 1915 when reviewing the  
2 adequacy of a complaint or amended complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th  
3 Cir. 2000).

4 Under Rule 12(b)(6), the court must dismiss the complaint if it fails to “state a claim for  
5 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts  
6 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that the  
7 factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).  
8 Although the complaint need not contain detailed factual allegations, it must offer more than “a  
9 formulaic recitation of the elements of a cause of action” and “raise a right to relief above a  
10 speculative level.” *Twombly*, 550 U.S. at 555.

11 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom Ins.*  
12 *Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court takes particular  
13 care when reviewing the pleadings of a *pro se* party, for a more forgiving standard applies to  
14 litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a  
15 liberal construction may not be used to supply an essential element of the claim not initially pled.  
16 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, the *pro se*  
17 plaintiff should be given leave to amend the complaint, and some notice of its deficiencies, unless  
18 it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103, 1107 (9th  
19 Cir. 1995).

### 20 III. DISCUSSION

21 Plaintiff names as defendant in this action the State of Nevada. (ECF No. 1-1 at 1.)  
22 Plaintiff’s complaint consists only of brief, nonsensical statements, such as, “No trial de nova  
23 (sic) for 5<sup>th</sup> Amendment or compromise of claims for Smith’s Food & Drug stores, Nike Shoe  
24 Company, or all due monies, etc.” (*See id.* at 6.) Aside from plaintiff’s statements, his complaint  
25 contains no factual or legal allegations. Federal Rule of Civil Procedure 8(a)(2) requires that a  
26 complaint contain “a short and plain statement of the claim showing that the pleader is entitled to  
27 relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon  
28 which it rests.” *Twombly*, 550 U.S. at 555 (quotation and alteration omitted). It must also include

1 “a demand for the relief sought . . . .” Fed. R. Civ. P. 8(a)(3). Plaintiff states no claim upon  
 2 which relief may be granted, and given the vague nature of the allegations, amendment would be  
 3 futile. *See Cato*, 70 F.3d at 1106. Therefore, it is recommended that the action be dismissed with  
 4 prejudice.

5 Further, the Eleventh Amendment protects nonconsenting states from suits by private  
 6 individuals in federal court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100  
 7 (1984). Congress did not abrogate the states’ Eleventh Amendment immunity in enacting §  
 8 1983, *Quern v. Jordan*, 440 U.S. 332, 345 (1979), nor has Nevada waived its immunity. Nev.  
 9 Rev. Stat. § 41.031(3). Accordingly, plaintiff’s claims against the State of Nevada are barred  
 10 and should be dismissed.

#### 11 IV. CONCLUSION

12 Consistent with the foregoing, the court finds that dismissal is warranted under 28 U.S.C.  
 13 1915(e)(2)(B)(ii). Because amendment would be futile, the dismissal should be with prejudice.  
 14 *See Cato*, 70 F.3d at 1106.

15 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
 16 Practice, the parties may file specific written objections to this Report and Recommendation  
 17 within fourteen days of receipt. These objections should be entitled “Objections to Magistrate  
 18 Judge’s Report and Recommendation” and should be accompanied by points and authorities for  
 19 consideration by the District Court.

20 2. This Report and Recommendation is not an appealable order and any notice of  
 21 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s  
 22 judgment.

#### 23 V. RECOMMENDATION

24 **IT IS THEREFORE RECOMMENDED** that plaintiff’s application to proceed *in*  
 25 *forma pauperis* (ECF No. 1) be **GRANTED**;

26 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** plaintiff’s complaint (ECF  
 27 No. 1-1);

1           **IT IS FURTHER RECOMMENDED** that the complaint (ECF No. 1-1) be  
2 **DISMISSED WITH PREJUDICE.**

3 **DATED:**

*July 24, 2017*

*Valerie P. Powell*  
UNITED STATES MAGISTRATE JUDGE